# Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (In liquidation)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-02-504-1995

SITI NORMA YAAKOB, ABU MANSOR AND ABDUL MALEK AHMAD JJCA

22 NOVEMBER 1996

***Bankruptcy*** *— Property available for distribution — Deposits made under lease agreement — Deposits paid before commencement of winding-up proceedings — Whether deposits made to secure performance of lease could be set off against monies due after commencement of winding-up — Whether set-off resulted in undue preference — Whether property in deposits passed to appellant on date of lease or date of winding up or date of set-off — Whether s 41 of Bankruptcy Act 1967 validated set-off — Companies Act 1965 s 223, 233 & 293 — Bankruptcy Act 1967 ss 2, 41 & 53(1)*

***Companies and Corporations*** *— Winding up — Creditor's claim — Deposits paid before commencement of winding-up proceedings — Whether deposits made to secure performance of lease could be set off against monies due after commencement of winding-up — Whether set-off resulted in undue preference — Whether property in deposits passed to appellant on date of lease or date of winding up or date of set-off — Whether s 41 of Bankruptcy Act 1967 validated set-off — Companies Act 1965 s 223, 233 & 293 — Bankruptcy Act 1967 ss 2, 41 & 53(1)*

On 30 December 1988, the appellant and the respondent entered a leasing agreement ('the agreement') for a piece of equipment and a memorandum of deposit, wherein the respondent paid a refundable security deposit of RM64,500 and a prepaid rent deposit of RM3,958, totalling RM68,458 to the appellant. On 2 December 1989, a winding up petition was presented against the respondent. On 27 March 1990, the appellant terminated the agreement and demanded payment of RM101,625.54, the unpaid balance of the total lease rentals after deducting the security deposit and the prepaid rental deposit ('the deposits') on the ground that the presentation of the winding up petition was a breach of the lease. The respondent was wound up on 4 April 1990 and a liquidator was appointed for the purpose of the winding up. On 23 April 1990, under powers provided by s 233 of the Companies Act 1965 ('the Act'), the liquidator demanded payment of the deposits from the appellant. The demand was not complied with.

The liquidator filed a notice of motion in the High Court against the appellant for the return of the deposits on 14 July 1993. The judicial commissioner allowed the motion and ordered the appellant to pay RM68,458 to the respondent, ruling that the date of the set-off — not the date when the deposits were paid — was the relevant consideration in this case and, therefore, the set-off constituted an act relating to property belonging to the respondent, thus void by s 293 of the Act.

Three issues in the appeal were whether: (i) the deposits were an undue preference and therefore void under s 293 of the Act; (ii) the payment of the deposits — and not the set-off — was the relevant transaction from which it was to be determined whether a disposition of an asset of the respondent within s 223 of the Act had occurred; and (iii) s 41 of the Bankruptcy Act 1967 ('the Bankruptcy Act') applied and thus validated the set off.

Under (i), the appellant argued that while the set-off occurred after the petition for winding up, s 293 of the Act — when read with s 53(1) of the Bankruptcy Act — was not applicable. The appellant submitted that the respondent had to prove that the following five elements ('the five elements') stipulated in s 53 of the Bankruptcy Act were satisfied before it could be found that the deposits were an undue preference:

(a) that the transaction in question took place within six months prior to the commencement of the winding up;

(b) that it satisfied the description of one of the types of transaction mentioned in s 53(1) of the Bankruptcy Act;

(c) that it took place at the time when the company was insolvent;

(d) that the person in whose favour the transaction was effected stood in the relation of creditor to the company; and

(e) the effect of the transaction was to confer on that person preference, priority or advantage over the other creditors in the winding up.

Under (ii), the appellant argued that the word 'disposition' had a wide meaning and could include payment of the deposits. The payment of the deposits (not the set-off) was the transaction which had to be examined in order to determine whether there was a disposition of assets of the respondent within s 223 of the Act.

Under (iii), the appellant argued that a statutory right of set-off under ss 40 and 41 of the Bankruptcy Act were applicable to the winding up by virtue of s 291 of the Act.

**Held**, dismissing the appeal (Siti Norma Yaakob and Abu Mansor JJCA for the majority, Abdul Malek Ahmad JCA, dissenting):

(1) (Per **Siti Norma Yaakob JCA**) For the tender of the deposits, the facts showed that the transaction did not meet all five elements mentioned in s 53(1). Therefore, the transaction could not be rendered as an undue preference to the appellant, and hence, s 293 of the Act was also inapplicable (see p 510H); *Lian Keow Sdn Bhd (In liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 followed.

(2) (Per **Siti Norma Yaakob JCA**) With regard to the set-off, for s 53(1) of the Bankruptcy Act to apply, the set-off had to be instigated by the respondent, because the essence of the wrongdoing was that the respondent must be seen to have shown

a preference for the appellant to be paid its debt before any other creditor. Since the respondent did not effect the set-off, the set-off by the appellant could not be called a fraudulent preference against the respondent and the judicial commissioner erred in law when he decided it was so (see pp 510I and 511A–B).

(3) (Per **Siti Norma Yaakob JCA**) Since the payment of the deposits and the set-off did not amount to an undue preference in favour of the appellant, the next important issue was whether the appellant was a secured creditor entitled to be paid in priority over the other creditors of the respondent (via the set-off). On the facts of the case, the appellant was not a secured creditor by virtue of s 2 of the Bankruptcy Act, as the deposits were not security for a debt owing but rather made to secure the respondent's performance of the agreement. Hence, the appellant was not entitled to set-off by statute. No contractual right of set-off applied either, as the contract only allowed set-off of the deposits at the end of the lease and made no provision for set-off in the event of early termination of the contract as was in this case (see pp 511C–D, F–I and 512A–C).

(4) (Per **Siti Norma Yaakob JCA**) The set-off fell within the definition of a disposition under s 223 of the Act. However, s 41 of the Bankruptcy Act could not protect the appellant as it required mutuality and plurality of debts as between the appellant and the respondent. There were no mutual credits, mutual debts or other mutual dealings between the parties, hence s 41 of the Bankruptcy Act did not apply and the appellant was not entitled to set-off.

Further, it was clear that the deposits were made for a specific purpose, ie to secure the respondent's observance and performance of the agreement.The facts showed that the property in the deposits never passed to the appellant and, as such, the deposits never formed part of the appellant's assets, it held the deposits as a trustee for the respondent. In this respect, the judicial commissioner was correct when he found that as at 30 December 1988 when the deposits were tendered, the property in the deposits remained with the respondent and it continued to remain so up to 2 December 1989 when winding up commenced against the respondent (see pp 512I, 513A, H–I and 514A–G); *MS Fashions Ltd & Ors v Bank of Credit and Commerce International SA (In liquidation) & Ors (No 2)* [1993] 3 All ER 769, *Good Property Land Development Pte Ltd (In liquidation) v Societe-Generale* [1996] 2 SLR 239 followed.

Cases referred to

*Good Property Land Development Pte Ltd (In liquidation) v Societe-Generale* [1996] 2 SLR 239 (folld)

*Lian Keow Sdn Bhd (In liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 (folld)

*MS Fashions Ltd & Ors v Bank of Credit and Commerce International SA (In liquidation) & Ors (No 2)* [1993] 3 All ER 769 (folld) A

(5) (Per **Abu Mansor JCA**) Arguments related to the issues of whether the payment of the deposits was a disposition and whether s 41 of the Bankruptcy Act applied were without merit. The real issue to decide was whether the set-off was valid. B

In this case, the set-off was not valid. The set-off date of 27 March 1990 was the relevant date, and on that date, all five elements were established and ss 293, 223 and 233 of the Act applied to the facts of the case. The appellant did not meet the criteria of a preferred creditor under s 292 of the Act nor of a secured creditor under s 2 of the Bankruptcy Act. The set-off was void because it was an undue preferential payment under s 293 of the Act. No property of the respondent had ever passed to the appellant. Also, no lien was found. The appellant was thus obligated to return the deposits to the liquidator (see pp 518E–F, 517F–I, 518A–C and 521A–B). C D

(6) (Per **Abdul Malek Ahmad JCA**, dissenting) The key to whether the set-off was valid or void lay in the interpretation of cl 4.3 of the lease agreement. This clause categorically stated that if the respondent was in default under any of the provisions of the lease agreement, and winding up was one of the events specified in cl 14, the appellant was entitled to apply the deposits against any monies, damages and arrears as it thought fit and on demand by the appellant, the respondent must pay the full amount of the deposits to set-off the amount actually due. E

Thus, the key date was 2 December 1989, ie the date of the winding up petition. By this act, the respondent breached the lease agreement, and property in the deposits passed to the appellant. Hence, the appellant did not claim to be a creditor or that it was in a better position than the other creditors. The liquidator's mandate under s 233 of the Act thus did not apply to the deposits (see p 528A–B, C–E). F G

(7) (Per **Abdul Malek Ahmad JCA**) The set-off was neither void nor voidable. The act of default must be construed as a normal act of default under any normal commercial transaction where the aggrieved party had a right under the agreement to forfeit the amount paid. There was no question of priority, preference or advantage over other creditors in a winding up as the set-off would relate only to the default and nothing else. Once the default took place, property in the deposits passed automatically to the appellant, who was entitled to the money. Also, the payment of the deposits on 30 December 1988 did not take place within six months prior to the commencement of winding up; it took place when the respondent was solvent and hence the effect of the transaction was not to confer any preference on the appellant H I

A because at that time, the appellant was not a creditor of the respondent (see pp 536A, 535F–G and 528G–H); *Good Property Land Development Pte Ltd v Societe-Generale* [1996] 2 SLR 239 distinguished.

B Cases referred to

*Bah Heng Hong Sdn Bhd v The Provisional Liquidator Choong Shin Cheong & Anor* [1992] 3 CLJ 1421

*JB Precision Moulding Industries Sdn Bhd (In liquidation) v Asia Commercial Finance (M) Sdn Bhd* [1994] 1 MLJ 734

*Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89

C *Margart Pty Ltd (In liquidation), Re; Hamilton v Westpac Banking Corp & Anor* (1984) 2 ACLC 709

**[Bahasa Malaysia summary**

D Pada 30 Disember 1988, perayu dan penentang telah mengikat suatu perjanjian pajakan ('perjanjian tersebut') untuk kelengkapan dan suatu memorandum deposit, dalam mana penentang telah membayar deposit cagaran yang boleh dibayar balik sebanyak RM64,500 dan suatu deposit sewa yang dibayar dahulu sebanyak RM3,958, kesemuanya berjumlah RM68,458 kepada perayu. Pada 2 Disember 1989, suatu petisyen penggulungan telah dikemukakan terhadap E penentang. Pada 27 Mac 1990, perayu menamatkan perjanjian tersebut dan menuntut bayaran RM101,625.54, baki jumlah sewa pajakan yang belum dibayar selepas menolak deposit cagaran dan deposit sewa yang dibayar dahulu ('deposit tersebut') atas alasan bahawa pengemukaan petisyen penggulungan merupakan F kemungkiran pajakan. Penentang digulung pada 4 April 1990 dan penyelesai dilantik untuk tujuan penggulungan. Pada 23 April 1990, di bawah kuasa yang diperuntukkan oleh s 233 Akta Syarikat 1965 ('Akta tersebut'), penyelesai menuntut bayaran deposit tersebut daripada perayu. Tuntutan itu tidak dipatuhi.

G Pada 14 Julai 1993, penyelesai memfailkan suatu notis usul di Mahkamah Tinggi terhadap perayu meminta supaya deposit tersebut dikembalikan. Pesuruhjaya kehakiman membenarkan usul itu dan memerintah perayu membayar RM68,458 kepada penentang, dengan memutuskan bahawa tarikh tolakan — bukan tarikh apabila deposit tersebut dibayar — adalah isu yang perlu dipertimbangkan dalam kes H ini dan, oleh itu, tolakan membentuk tindakan yang berkaitan dengan harta kepunyaan penentang, justeru itu ianya tak sah melalui s 293 Akta tersebut.

Tiga isu dalam rayuan ini adalah sama ada: (i) deposit tersebut merupakan keutamaan tak wajar dan dengan itu tak sah di bawah I s 293 Akta tersebut; (ii) bayaran deposit tersebut — dan bukan tolakan — adalah transaksi yang relevan daripada mana ia harus ditentukan sama ada suatu pelupusan aset penentang dalam maksud s 223 Akta tersebut telah berlaku; dan (iii) s 41 Akta Kebankrapan 1967 ('Akta Kebankrapan') terpakai dan dengan itu mengesahkan tolakan itu.

Di bawah (i), perayu menghujahkan bahawa sementara tolakan berlaku selepas petisyen penggulungan, s 293 Akta tersebut — apabila dibaca dengan s 53(1) Akta Kebankrapan — tidak terpakai. Perayu berhujah bahawa penentang harus membuktikan lima unsur berikut ('lima unsur tersebut') yang disyaratkan dalam s 53 Akta Kebankrapan dipenuhi sebelum ia boleh didapati bahawa deposit tersebut adalah keutamaan tak wajar:

(a) bahawa transaksi berkenaan berlaku dalam tempoh enam bulan sebelum penggulungan dimulakan;

(b) bahawa ia memenuhi gambaran salah satu daripada jenis transaksi yang disebut dalam s 53(1) Akta Kebankrapan;

(c) bahawa ia berlaku pada masa apabila syarikat tak solven;

(d) bahawa hubungan orang kepada mana transaksi dilaksanakan adalah dalam kedudukan si piutang syarikat; dan

(e) akibat transaksi adalah bahawa keutamaan, prioriti atau kelebihan dikurniakan kepada orang itu berbanding dengan si piutang lain dalam penggulungan.

Di bawah (ii), perayu berhujah bahawa perkataan 'pelupusan' mempunyai makna yang luas dan boleh merangkumi bayaran deposit tersebut. Bayaran deposit tersebut (bukan tolakan) adalah transaksi yang perlu diperiksa bagi menentukan sama ada terdapatnya pelupusan aset penentang dalam maksud s 223 Akta tersebut.

Di bawah (iii), perayu berhujah bahawa hak tolakan statutori di bawah ss 40 dan 41 Akta Kebankrapan terpakai kepada penggulungan menerusi s 291 Akta tersebut.

**Diputuskan**, menolak rayuan (Siti Norma Yaakob dan Abu Mansor HHMR untuk majoriti, Abdul Malek Ahmad HMR, bertentangan):

(1) (Oleh **Siti Norma Yaakob HMR**) Untuk menyerah deposit tersebut, fakta menunjukkan bahawa transaksi itu tidak memenuhi kesemua lima unsur yang disebut dalam s 53(1). Oleh yang demikian, transaksi tidak boleh dikatakan sebagai keutamaan tak wajar kepada perayu, dan oleh itu, s 293 Akta tersebut juga tidak terpakai (lihat ms 510H); *Lian Keow Sdn Bhd (In liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 diikut.

(2) (Oleh **Siti Norma Yaakob HMR**) Berhubung dengan tolakan, bagi membolehkan s 53(1) Akta Kebankrapan terpakai, tolakan haruslah dimulakan oleh penentang, sebab intipati kesalahan adalah bahawa penentang mestilah dikatakan telah menunjukkan keutamaan kepada perayu supaya dibayar hutangnya sebelum mana-mana si piutang yang lain. Oleh kerana penentang tidak melaksanakan tolakan, tolakan oleh perayu tidak boleh dikatakan keutamaan terhadap penentang dan pesuruhjaya kehakiman tersilap dari segi undang-undang apabila beliau memutuskan demikian (lihat ms 510I dan 511A–B).

(3) (Oleh **Siti Norma Yaakob HMR**) Oleh kerana bayaran deposit tersebut dan tolakan tidak merupakan keutamaan tak wajar yang memihak kepada perayu, isu penting yang berikut adalah sama ada perayu merupakan si piutang bercagar yang patut dibayar terlebih dahulu daripada si piutang lain penentang (melalui tolakan). Atas fakta kes, perayu bukanlah si piutang bercagar dalam maksud s 2 Akta Kebankrapan, sebab deposit tersebut bukanlah cagaran untuk hutang tetapi dibuat untuk menjamin pelaksanaan perjanjian oleh penentang. Maka, perayu tidak berhak kepada tolakan oleh statut. Tiada hak tolakan kontraktual terpakai juga, sebab kontrak hanya membenarkan tolakan deposit tersebut di penghujung pajakan dan tidak membuat peruntukan bagi tolakan sekiranya berlaku penamatan awal kontrak seperti yang telah berlaku dalam kes ini (lihat ms 511C–D, F–I dan 512A–C).

(4) (Oleh **Siti Norma Yaakob HMR**) Tolakan dirangkumi oleh tafsiran suatu pelupusan di bawah s 223 Akta tersebut. Namun demikian, s 41 Akta Kebankrapan tidak dapat melindungi perayu sebab ia menghendaki kesalingan dan kejamakan hutang antara perayu dan penentang. Tiadanya kredit bersaling, hutang bersaling atau urusan-urusan bersaling yang lain antara pihak-pihak, maka s 41 Akta Kebankrapan tidak terpakai dan perayu tidak berhak kepada tolakan.

Selanjutnya, adalah jelas bahawa deposit tersebut dibuat untuk tujuan spesifik, iaitu untuk menjamin pematuhan dan pelaksanaan perjanjian oleh penentang. Fakta-fakta menunjukkan bahawa harta dalam deposit tersebut tidak pernah beralih kepada perayu dan oleh yang demikian, deposit tersebut tidak pernah membentuk sebahagian daripada aset perayu, ia memegang deposit tersebut sebagai pemegang amanah untuk penentang. Mengenai hal ini, pesuruhjaya kehakiman adalah betul apabila beliau mendapati bahawa pada 30 Disember 1988 apabila deposit tersebut diserah, harta dalam deposit tersebut masih berada dengan penentang dan ia terus kekal demikian sehingga 2 Disember 1989 apabila penggulungan dimulakan terhadap penentang (lihat ms 512I, 513A, H–I dan 514A–G); *MS Fashions Ltd & Ors v Bank of Credit and Commerce International SA (In liquidation) & Ors (No 2)* [1993] 3 All ER 769, *Good Property Land Development Pte Ltd (In liquidation) v Societe-Generale* [1996] 2 SLR 239 diikut.

(5) (Oleh **Abu Mansor HMR**) Hujah berkaitan isu sama ada bayaran deposit tersebut merupakan pelupusan dan sama ada s 41 Akta Kebankrapan yang terpakai adalah tanpa merit. Isu sebenar yang harus ditentukan ialah sama ada tolakan adalah sah.

Dalam kes ini, tolakan adalah tak sah. Tarikh tolakan iaitu 27 Mac 1990 adalah tarikh yang relevan, dan pada tarikh itu, kesemua lima unsur tersebut diwujudkan dan ss 293, 223 dan 233 Akta tersebut terpakai kepada fakta kes. Perayu tidak

memenuhi kriteria si piutang utama di bawah s 292 Akta tersebut atau pun si piutang bercagar di bawah s 2 Akta Kebankrapan. Tolakan adalah tak sah sebab ia merupakan bayaran keutamaan tak wajar di bawah s 293 Akta tersebut. Tiada harta kepunyaan penentang pernah dialihkan kepada perayu. Juga, tiada lien dijumpai. Justeru itu, perayu wajib mengembalikan deposit tersebut kepada penyelesai (lihat ms 518E–F, 517F–I, 518A–C dan 521A–B).

(6) (Oleh **Abdul Malek Ahmad HMR**, menentang) Kunci kepada persoalan sama ada tolakan adalah sah atau tak sah terletak dalam tafsiran fasal 4.3 perjanjian pajakan. Fasal ini menyatakan secara mutlak bahawa jika penentang ingkar di bawah mana-mana peruntukan perjanjian pajakan, dan penggulungan adalah salah satu daripada peristiwa yang ditetapkan dalam fasal 14, perayu berhak menggunakan deposit tersebut terhadap apa-apa wang, ganti rugi dan tunggakan sebagaimana ia fikir patut dan atas tuntutan oleh perayu, penentang mestilah membayar amaun penuh deposit bagi menolak amaun yang sebenarnya harus dibayar.

Maka, tarikh yang penting adalah 2 Disember 1989, yakni tarikh petisyen penggulungan. Melalui tindakan ini, penentang telah mungkir perjanjian pajakan, dan harta dalam deposit beralih kepada perayu. Justeru itu, perayu tidak mendakwa dirinya si piutang atau bahawa ia berada dalam kedudukan yang lebih baik daripada si piutang lain. Mandat penyelesai di bawah s 233 Akta tersebut dengan itu tidak terpakai kepada deposit tersebut (lihat ms 528A–B, C–E).

(7) (Oleh **Abdul Malek Ahmad HMR**) Tolakan itu tidak terbatal atau pun boleh dibatal. Tindakan keingkaran mestilah ditafsirkan sebagai tindakan keingkaran yang biasa di bawah mana-mana transaksi perdagangan biasa di mana pihak terkilan mempunyai hak di bawah perjanjian untuk melucuthak amaun yang dibayar. Tiada terdapat persoalan prioriti, keutamaan atau kelebihan si piutang lain dalam suatu penggulungan sebab tolakan hanya berkaitan keingkaran dan tiada mengenai perkara lain. Sekiranya keingkaran berlaku, harta dalam deposit tersebut beralih secara automatik kepada perayu, yang berhak kepada wang itu. Juga, bayaran deposit tersebut pada 30 Disember 1988 tidak berlaku dalam tempoh enam bulan sebelum penggulungan dimulakan; ia berlaku ketika penentang solven dan maka akibat transaksi adalah untuk tidak mengurniakan apa-apa keutamaan atas perayu sebab pada masa itu, perayu bukanlah si piutang penentang (lihat ms 536A, 535F–G dan 528G–H); *Good Property Land Development Pte Ltd v Societe-Generale* [1996] 2 SLR 239 dibeza.]

**Notes**

For cases on property available for distribution in bankruptcy, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1581–1604.

For companies winding-up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

**Complete list of cases referred to**

*Bah Heng Hong Sdn Bhd v Provisional Liquidator Choong Shin Cheong & Anor* [1992] 3 CLJ 1421

*Good Property Land Development Pte Ltd (In liquidation) v Societe-Generale* [1996] 2 SLR 239

*JB Precision Moulding Industries Sdn Bhd (In liquidation) v Asia Commercial Finance (M) Sdn Bhd* [1994] 1 MLJ 734

*Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449

*Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89

*MS Fashions Ltd & Ors v Bank of Credit and Commerce International SA (In liquidation) & Ors (No 2)* [1993] 3 All ER 769

*Margart Pty Ltd (In liquidation), Re; Hamilton v Westpac Banking Corp & Anor* (1984) 2 ACLC 709

**Legislation referred to**

Bankruptcy Act 1967 (Act 360) ss 2, 40, 41, 53(1),
Companies Act 1965 (Act 125) ss 108(3), 223, 233, 291, 293,
Companies Code [Aust] s 368

**Appeal from**: Originating Motion No 17 of 1993 (High Court, Johor Bahru)

*Chang Mun Fong* (*Low Chi Cheng* with her) (*Lim Kian Leong & Co*) for the appellant.

*Ong Ban Chai* (*Soon Eng Thye* with him) (*Ong Ban Chai & Co*) for the respondent.

*Cur Adv Vult*

**Siti Norma Yaakob JCA**: Proceedings leading to this appeal were first commenced in the High Court in Johor Bahru where the respondent (the applicant in the court below) had sued the appellant (the respondent in the court below) for the return of two security deposits made by the respondent to the appellant upon the execution of an equipment lease agreement ('the agreement') entered into between them.

Under the agreement dated 30 December 1988, the appellant leased one unit Elite E 330B plastic injection moulding machine complete with accessories ('the equipment') to the respondent for a period of 36 months

at a monthly rental of RM3,958. Under cl 4 read together with item (6) of the schedule to the agreement, the respondent made two deposits to the appellant as security for the due observance and performance by the respondent of all the stipulations, terms and conditions of the agreement. The first security deposit is a sum of RM64,500 and the other a sum of RM3,958 this being the prepaid rent. Both deposits totalling RM68,458 ('the deposits') were tendered by the respondent to the appellant on the day the agreement was executed on 30 December 1988.

The payment of the security deposit of RM64,500 is evidenced by a memorandum of deposit dated 30 December 1988, declaring such payment to be a refundable deposit free of interest at the expiry of the agreement and upon the complete satisfaction of each and every term of the agreement.

It was during the currency of the agreement (almost a year to be exact) that a creditor, Jasapadu Sdn Bhd filed a winding up petition against the respondent in the High Court at Johor Bahru on 2 December 1989. Upon discovery of this, the appellant through its solicitors and acting under cll 14.1(g) and 14.1(ii) of the agreement, caused a written notice, dated 27 March 1990 to be issued against the respondent terminating the agreement forthwith on the ground that the presentation of the winding up petition constituted a breach of the agreement. By the same notice the appellant reserved its rights to retake possession of the equipment without any further notice and, by reason of the termination, demanded a sum of RM101,625.54 as being due and payable under the agreement as at 26 March 1990. This amount included, inter alia, the loss of rentals for the remaining period of the lease and other sums due under the agreement after a set-off was given for the deposits. The respondent was given seven days from the date of the notice to pay the amount, failing which legal proceedings would commence without further notice.

A winding up order under the provisions of the Companies Act 1965 ('Act 125') was made against the respondent on 4 April 1990 pursuant to the winding up petition and one Mr Ng Pyak Yeow ('the liquidator') was appointed liquidator of the affairs of the respondent.

On 23 April 1990, the liquidator exercising his powers under s 233 of Act 125, sent a notice requiring the appellant to repay the deposits to him within seven days of service of the notice on the ground that the appellant is not a preferred or secured creditor and that the respondent is entitled to such deposits for the benefit of all its creditors. The appellant resisted such a claim and took the stand that it has a lien over the deposits and is entitled to set-off the deposits against the amount due and owing to it under the agreement. This led to the liquidator filing Originating Summons No 17 of 1993 on 14 July 1993 against the appellant for a vesting order that the appellant refund the deposits with interest to him on the ground that the appellant is only a trustee of such funds and as such had no right to retain the deposits as it is not a preferred creditor under s 293 of Act 125, nor a secured creditor under s 2 of the Bankruptcy Act 1967 ('Act 360') and that the forfeiture of the deposits amounted to a

A fraudulent undue preference and void under s 223 of Act 125, contentions that were upheld by the learned judicial commissioner who heard the case and hence the present proceedings before us.

Except for the contentions of the respective parties, the facts alluded to above are in no way disputed and in its memorandum of appeal, B 15 grounds (and not 16 as mistakenly stated) have been identified by the appellant to show where the learned judicial commissioner had erred in allowing the respondent's application with costs. However, before us, Miss Chang Mun Fong, learned counsel for the appellant grouped the 15 grounds into three heads and identified the issues to be as follows:

C (1) grounds (1) to (9) cover the issue of whether the deposits were an undue preference given to the appellant and therefore void under s 293 of Act 125;

(2) ground (10) relates to whether set-off is a disposition under s 223 of Act 125; and

D (3) grounds (11) to (15) cover the issue that in the event the appellant has the statutory right of set-off under s 41 of Act 360, is the appellant obliged to effect the set-off before it proves its debt under ss 40 and 41 of Act 360, which by virtue of s 291 of Act 125 are applicable to winding up matters.

E The learned judicial commissioner summarized the issues raised by the appellant by posing the following questions:

(1) whether the transaction is caught by ss 293, 223 and 233 of Act 125; and

(2) whether the appellant could forfeit the deposits by setting them off F against the amount owing by the respondent under the agreement upon the termination of the agreement.

He then proceeded to consider the nature and effect of the deposits made by the respondent on 30 December 1988 and after concluding that the property in the deposits did not pass to the appellant on 30 December G 1988, held that the appellant had no right to retain or forfeit such deposits. We now have to consider whether he had arrived at the right conclusion.

For starters, we remind ourselves that there are certain provisions of Act 360 relating to the administration of a bankrupt's property that apply mutatis mutandis to the affairs of a company in liquidation. A related H matter is whether an insolvent company has given undue preference to a creditor to be paid its debt first before any other creditors, and to determine this issue, the Supreme Court had in the case of *Lian Keow Sdn Bhd (In liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 held that (at p 452):

I > Section 53 of the Bankruptcy Act 1967 (as amended) is imported into a winding up proceeding of a company by s 293(1) of the Companies Act 1965 which provides, inter alia, that:

> 'Any transfer ... or other act relating to property made or done by ... a company which, if it had been made or done by ... an individual, would in his bankruptcy under the law of bankruptcy void or voidable shall in the event of the company being wound up be void or voidable in like manner.'

In short, the rules of bankruptcy as to fraudulent preference are applied to the winding up of the company by the court by s 293(1) of the Companies Act 1965.

It is argued before us that before a transaction can be considered void under s 293(1) of Act 125, the liquidator need to prove five elements of an undue preference as set out by s 53(1) of Act 360, which states as follows:

> Every ... transfer of property ... made by any person unable to pay his debts, as they became due, from his own money in favour of any creditor ... shall be deemed to have given such creditor a preference over other creditors if the person making ... the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making ... the same and every such act shall be deemed fraudulent and void as against the Official Assignee.

The five elements have been identified to be:

(1) that the transaction took place six months prior to the commencement of the winding up;

(2) that it satisfied the description of one of the types of transaction mentioned in s 53(1) of Act 360;

(3) that it took place at the time when the company was insolvent;

(4) that the person in whose favour the transaction was effected stood in relation of creditor to the company; and

(5) the effect of the transaction was to confer on that person a preference, priority or advantage over other creditors in the winding up.

The transaction that is being questioned here is firstly the tender of the deposits by the respondent and secondly the legal effect of the set-off by the appellant. The respondent tendered the deposits on 30 December 1988 which in point of time happened 11 months prior to the presentation of the winding up petition against the respondent on 2 December 1989. At that point of time too, there is no evidence to suggest that the respondent was insolvent or that the appellant was a creditor of the respondent or that the very nature of the deposits conferred the appellant a priority to be paid its debt first in preference to any other creditors.

I am in complete agreement with Miss Chang that the transaction merely satisfies one element namely that it is one of the types of transaction mentioned in s 53(1), but this, per se, does not render such a transaction to be an undue preference to the appellant and to that end I agree with Miss Chang that s 293(1) is not applicable.

As for the set-off, it must be remembered that it was effected by the appellant, but for the provisions of s 53(1) of Act 360 to apply, the act complained of must be the act of the insolvent debtor, the respondent. The essence of the wrong doing is that the respondent must be seen to

A have shown a preference for the appellant to be paid its debt before any other creditor. Since the respondent did not effect the set-off, it cannot therefore be said that the appellant's act of setting off the deposits against the amount due to it under the agreement amounted to a fraudulent preference and void against the respondent. In this respect, the learned judicial commissioner had erred in law when he decided it was so.

B

On the facts of the case before us, the conduct that is relevant and questionable is not so much the payment of the deposits as that has been mutually agreed between the parties, but the legal effect the set-off has on the other creditors of the respondent. Having determined that payment of the deposits and the set-off do not amount to preferring the appellant to be C paid its debt in priority to the respondent's other creditors, can the appellant forfeit the deposits by virtue of the fact that the deposits were securities provided for by the respondent? Expressed in another form, is the appellant a secured creditor entitling it to be paid in priority over the respondent's other creditors?

D The appellant has pleaded that it has a lien over the deposits and, by reason of this, is entitled to forfeit the deposits, thereby giving itself priority and that such a forfeiture cannot amount to a preferential treatment as contemplated by s 293 of Act 125.

Act 125 does not define who qualifies to be a secured creditor but by E virtue of the provisions of s 4(1) of the Civil Law Act 1956, bankruptcy rules as to the respective rights of secured and unsecured creditors under the law of bankruptcy apply mutatis mutandis to a winding up of a company. In this respect, s 2 of Act 360 defines a 'secured creditor' to be:

> ... a person holding a mortgage, charge or lien on the property of the debtor F or any part thereof as a security for a debt due to him from the debtor ... .

This statutory definition rules out the appellant as a secured creditor as the deposits were not meant to be securities for a debt due from the respondent to the appellant, but were mutually agreed to be made by the respondent to secure the latter's observance and performance of all its rights, obligations G and undertakings under the agreement. This is clear from the provisions of cll 4.1 and 4.2 of the agreement.

As the appellant is not a secured creditor, can it claim that it has a contractual set-off against the respondent? As I have stated earlier, the deposits were made to secure the respondent's observance and performance H of all its rights, obligations and undertakings under the agreement. In respect of the security deposit of RM64,500, cl 4.1 of the agreement goes further to state that it:

> ... shall be maintained at the same amount during the term of this agreement and shall not be treated as payment of the rent or any part thereof and the I same shall be returned to the lessee free of interest on the termination of this agreement less such sums as may be due to the lessor under the terms of this agreement but without prejudice to any other claims which the lessor may have against the lessee under the terms of this agreement.

It is clear from the provisions of cl 4.1 read together with the memorandum of deposit that:

(1) The security deposit of RM64,500 is a refundable, interest free deposit.

(2) The refund can only be made when the agreement has been terminated which I consider must mean at the end of the lease period as premature terminations are governed by cl 14 of the agreement.

(3) Set-off is allowed but only at the end of the lease period which under cl 2 read together with item (5) of the schedule is 36 months. Consequently, it is only after the end of the three-year period that the appellant can set-off that deposit against any sum due to it under the agreement.

Likewise, the prepaid rent deposit of RM3,958 made under cl 4.2:

> ... shall be automatically applied by the lessor in satisfaction of the rent falling due on the dates mentioned in the said item (6) of the schedule on the due dates therefor until it is exhausted provided always that this provision shall in no way relieve the lessee from promptly paying the rent falling due on dates other than those mentioned in the said item (6) of the schedule.

Item (6) of the schedule mentions only one date, ie covering last one month. This can only mean that if the respondent elected not to pay the rent for the 36th month, the prepaid rent deposited would be set-off to pay the last rental due under the agreement. The effect of cl 4.2 is the same as that governing the security deposit under cl 4.1 in that the set-off is only exercisable at the end of the lease period.

On the facts of the case before us, the lease was prematurely terminated under cl 14 which makes no mention of any right to set-off the deposits against any sum due under the agreement. As such, the exercise of the right of set-off by the appellant is wrong and cannot be supported.

We now consider whether the provisions of s 223 of Act 125 can be applied to render the set-off void. That section in so far as it is relevant to the facts of this appeal states as follows:

> Avoidance of dispositions of property etc
>
> Any disposition of the property of the company including things in action ... made after the commencement of the winding up by the court shall unless the court otherwise order be void.

Under s 219(2) of Act 125, the winding up of a company is deemed to have commenced at the time of the presentation of the petition for winding up. On the facts of this case, the winding up of the respondent commenced on 2 December 1989 when the winding-up petition was presented to the court. The set-off was made on 27 March 1990 when the agreement was terminated and as such the act of disposing the deposits was made after the commencement of the winding up. But can set-off be regarded as a disposition under s 223? I consider that it can as the statutory definition is

A wide enough to include a set-off, but in this respect the appellant seeks the protection of s 41(1) of Act 360 which states as follows:

> 41 Mutual credit and set-off
>
> (1) Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order is made under this Act and any other person proving or claiming to prove a debt under such order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account and no more shall be claimed or paid on either side respectively.

The appellant contended that the act of forfeiting the deposits by setting them off against the amount due under the agreement is justifiable as it is not a disposition but made mandatory under s 41(1) of Act 360 and since the deposits are insufficient to settle the debt in full, it can thereafter turn to the liquidator to prove for the balance. This contention although argued in the court below is not dealt with in the judgment of the judicial commissioner.

Section 41(1) is made applicable to a company's winding up by virtue of s 291(2) of Act 125 which states:

> (2) Subject to section 292, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.

*The Law of Company Liquidation* by BH McPherson at p 344 has this to say when discussing the subject of what may be set-off with regards to debts provable in liquidation:

> There are, however, three requirements which must always be satisfied before set-off can take place: (a) the claims must exist at the commencement of the winding up; (b) they must be commensurable; and (c) there must be mutuality.

Section 41(1) or insolvency set-off as was referred to by Hoffmann LJ in the English case of *MS Fashions Ltd & Ors v Bank of Credit and Commerce International SA (In liquidation) & Ors (No 2)* [1993] 3 All ER 769 makes reference to the presence of 'mutual credits, mutual debts or other mutual dealings' in the plural and likewise the three requirements as stated above speak of 'claims' in the plural. This element of plurality coupled with the characteristic of mutuality form the very basis that there exists as between the parties cross claims or debts for which one is entitled to be set-off as

against the other. That same sentiment was echoed by Lai Kew Chai J in the Singaporean case of *Good Property Land Development Pte Ltd (In liquidation) v Societe-Generale* [1996] 2 SLR 239 when he stated:

> ... that for mutuality to exist, two conditions must generally be satisfied. First, each claimant must be personally liable for the debt he owes to the other claimant. Mutuality sees through to the real beneficial ownership, regardless of who is the legal, nominal, titular or procedural holder of the claim or procedurally the appropriate plaintiff. Secondly, each claimant must beneficially own the claim which is owed to him by the other claimant and his ownership interest in that claim must be clear and ascertained without inquiry.

On the facts of the instant appeal, it seems to me there are no mutual credits, mutual debts or other mutual dealings between the parties. The one dealing on the agreement merely gives rise to a debt due from the respondent to the appellant for which the appellant seeks part payment by setting off the deposits against the debt. There is no corresponding debt due from the appellant to the respondent and it is this absence of mutuality that robs the appellant of any right to set-off the deposits against the debt due under the agreement.

Another factor that must be brought to mind is the fact that the deposits were made for a specific purpose, ie to secure the respondent's observance and performance of the agreement. By virtue of the provisions of cll 4.1 and 4.2 of the agreement under which the deposits were made, the property in the deposits never passed to the appellant. It remained throughout with the respondent. As such, the deposits never formed part of the appellant's assets, it holds the deposits as a trustee for the respondent. This is also made clear from the intention expressed in the agreement that such deposits shall not be treated as payment of rentals and returnable, interest free, at the expiry of the lease period less any sums due to the appellant. In this respect, the judicial commissioner is correct when he found that as at 30 December 1988 when the deposits were tendered, the property in the deposits remained with the respondent and it continued to remain so up to 2 December 1989 when winding up commenced against the respondent.

Since the appellant cannot claim to be the beneficial owner of the deposits, it follows that the appellant cannot claim to have the right of set-off against the respondent. On this ground alone, the appellant must make a refund of the deposits with interest to run from the date of demand to the liquidator. For the reasons given in this judgment, this appeal is dismissed with costs, the order of the judicial commissioner is affirmed and the deposit is to be paid out to the respondent to account of its taxed costs.

**Abu Mansor JCA**: This is an appeal against the order of the learned judicial commissioner at Johor Bahru given on 5 June 1995 allowing the application of the respondent's liquidator for an order that the appellant

A pay the respondent a sum of RM68,458 and costs. We heard arguments on 11 September 1996 but had reserved judgment.

The facts leading to the judicial commissioner's order were as follows. On 30 December 1988, the appellant had entered into an agreement for leasing certain equipment with the respondent wherein under its terms the B respondent had to pay a refundable security deposit of RM64,500 and a prepaid rent deposit of RM3,958 totalling RM68,458.

On 2 December 1989, a winding up petition was presented against the respondent. The appellant then through his solicitors, on 27 March 1990, gave notice to the respondent terminating the lease agreement and C demanded payment of amounts totalling RM101,625.54 which is the unpaid balance of the total lease rentals after deducting the security deposit and the prepaid rent deposit on the ground that the presentation of the winding up petition constituted a breach of the lease with which we are not concerned. The respondent was eventually wound up by the Johor Bahru High Court on 4 April 1990 and it ordered one Ng Pyak Yeow ('the D liquidator') to be appointed liquidator for the purpose of the winding up. On 23 April 1990 the liquidator, as he was duty bound, duly demanded the payment of the security deposit and the prepaid rent deposit from the appellant but he met with no response.

The liquidator then filed a notice of motion in the High Court against E the appellant for the return of the security deposit and prepaid rent deposit. As the application was filed on 14 July 1993, after the winding up of the respondent, the appellant's reply was that they could not return the security deposit and the prepaid rent deposit in view of ss 223 and 293 of the Companies Act 1965 ('the Act'). The learned judicial commissioner on 5 June 1995 allowed the motion and ordered the appellant to pay the amount of RM68,458 to the F respondent. Hence this appeal.

The appellant in its memorandum of appeal put forward 16 grounds but its learned counsel was able to group them under three headings. Firstly, grounds (1)–(9) covered the issue of whether the security deposit and prepaid rent deposit were undue preference and therefore void under G s 293 of the Act. Secondly, in ground (10), the issue was whether it was the transaction, ie the payment of the security deposit and prepaid rent deposit — and not the set-off — amounted to establishing a disposition of an asset of the respondent within s 223 of the Act. Thirdly, grounds (12)–(16) were whether, in any event, s 41 of the Bankruptcy Act 1967 ('the 1967 Act') applies which, by virtue of s 291 of the Act, are applicable to H winding up matters.

Having regard to the first ground, the appellant's counsel contended that before the security deposit and prepaid rent deposit could fall within the meaning of undue preference under s 293 of the Act, read together with s 53(1) of the 1967 Act, there must be fulfilled five elements. They I are:

(a) that the transaction in question took place within six months prior to the commencement of the winding up;

(b) that it satisfies the description of one of the types of transaction mentioned in s 53(1) of the 1967 Act; A

(c) that it took place at the time when the company was insolvent;

(d) that the person in whose favour the transaction was effected stood in the relation of creditor to the company; and

(e) the effect of the transaction was to confer on that person a preference priority or advantage over other creditors in the winding up. B

The appellant's counsel submitted further that the onus is on the liquidator to prove all the five elements above stated.

The appellant's counsel contended that in the present case, the security and the prepaid rent deposits were paid on 30 December 1988 and the memorandum of deposit was created on the same day which was approximately 11 months before the date of presentation of the winding up petition against the respondent, namely 2 December 1989. C

It was beyond dispute that on 30 December 1988, at the time the security and prepaid rent deposits were placed in the hands of the appellant, no evidence was adduced by the liquidator that the respondent was at that material time insolvent or unable to pay its debts or that the intention of the parties was to confer a preferential priority or advantage over other creditors. The transaction was done in the usual course of business and was a normal straightforward commercial transaction. D E

However, the learned judicial commissioner held that the relevant consideration was when the set-off was in fact made and that constituted an act relating to property belonging to the respondent and, therefore, was void under s 293 of the Act.

Learned counsel submitted that although the set-off was effected on 27 March 1990, after the presentation of the winding-up petition, nonetheless it did not fall within the terms of s 293 of the Act read together with s 53 of the 1967 Act. F

The learned counsel further contended that the judicial commissioner had failed to appreciate that the act which was alleged to be an undue preference must be a positive act of the respondent or at the very least that the respondent must have authorized, permitted, or concurred in, it being done or that he collaborated in doing it. On the facts of the case, counsel submitted that the positive act, authorization or concurrence was done or given by the respondent when the respondent paid the security deposit and prepaid rent deposit to the appellant. The set-off was an act done by the creditor and not that of the respondent and the consent to such set-off being made was given by the respondent well before the presentation of the winding up petition. G H

On the second issue, the appellant's counsel contended that the definition of 'disposition' is very wide. According to learned counsel, the payment of both deposits was a disposition and the 'disposition' of the security deposit and prepaid rent deposit was already completed by the act of depositing the security and prepaid rent deposits with the appellant and the execution of the memorandum. The security and prepaid rent deposits, I

being an asset of the respondent, passed into the hands of the appellant long before the presentation of the winding up petition.

Counsel submitted further that it is the transaction, ie the payment of the security deposit and payment of prepaid rent deposit and the creation of the memorandum — and not the set-off — that should be looked at in order to establish whether there was a disposition of an asset of the respondent within the terms of s 223 of the Act.

The transaction in this case, she submitted, was a pre-petition transaction with regard to an asset of the respondent which led to a post-petition set-off. In the circumstances, the set-off should not and cannot be rendered void under s 223 of the Act.

In any event, the appellant's counsel's contention was that the appellant has a statutory right of set-off in law under s 41 of the 1967 Act and is, in fact, obliged to effect the set-off before it proves its debts under ss 40 and 41 of the Bankruptcy Act 1967, which are by virtue of s 291 of the Act, applicable to winding up matters.

Counsel contended that the transaction between the appellant and the respondent falls within the definition of 'mutual debts, credits/dealings' the creation of which was prior to the presentation of the winding up petition and as such, was within the terms of s 41 of the 1967 Act.

Learned counsel contended further that the set-off was an accounting exercise and, by virtue of s 41 of the 1967 Act, was mandatory and, in the circumstances, the set-off is not and could not be an undue preference under s 293 of the Act nor a disposition under s 223 of the Act.

We have heard the submissions of both counsel and we have carefully considered the judgment of the learned judicial commissioner. At p 40 of the appeal record, the learned judicial commissioner held that in considering s 293 of the Act, it is the set-off that should be looked at to determine whether there is undue preference. In our answer to the appellant's counsel's argument, it is sufficient if we were to set down the learned judicial commissioner's admirable and lucid judgment at pp 40–41 of the appeal record with which we are in agreement, where the appellant was respondent before him:

> In the light of the relevant provisions of the said Act and the Bankruptcy Act referred to above, can the respondent forfeit the said deposit? In other words, the issue is whether the respondent is a 'secured creditor' so that the set-off by them of the security deposit paid under the memorandum of deposit and the prepaid rent deposit do not amount to an undue preferential payment to creditors contemplated by s 293 of the said Act.
>
> The said s 293 referred to earlier, provides, inter alia, that any act relating to property made against a company shall, in the event of the company being wound up, be void or voidable, such act amounts to an act of undue preference which is void under the Act under such circumstances. The respondent has set-off the security deposit and the prepaid rent deposit after the date of the presentation of the petition. In my opinion, that act would be void as it amounts to an act relating to property which belongs to the applicant company against whom a winding up petition has been presented.

As found earlier, the property in the security deposit and prepaid rent deposit did not pass to the respondent when the lease agreement was made, and that being so, I am of the view that the respondent cannot at all be in a better position than the other creditors after the presentation of the winding up petition against the applicant company on 2 December 1989. The respondent is definitely not a preferred creditor under s 292 of the said Act, neither is he a 'secured creditor' as defined under s 2 of the Bankruptcy Act, that is, he is not a person holding a mortgage, charge or lien on the security deposit and the prepaid rent deposit. Those deposits may be in the possession of the respondent but the property in it still remain with the applicant company. The liquidator is required under s 233 of the Companies Act to take into custody or under his control all the property to which the applicant company is or appears to be entitled, falling which, he would be committing an offence under the Act and as such, I am of the view that the respondent, under the circumstances, cannot prevent him from carrying out his duty. In view of this statutory provision, the effect of cl 14.1(g)(ii) of the lease agreement (referred to earlier) is of no consequence and a non-issue.

We have considered carefully the submission of learned counsel for the appellant that the five elements as enumerated by her could not apply and therefore that transaction could not be held to be void if the relevant date to be taken is the date of the creation of the security and prepaid rent deposits, ie 30 December 1988, whereas the winding up came into effect on 2 December 1989.

With due respect to learned counsel for the appellant, we are unable to agree with her that the relevant date is 30 December 1988 because we are of the view, as correctly held by the learned judicial commissioner, that the relevant date is the date of set-off, ie 27 March 1990 which occurred after the coming into effect of the winding up of the respondent company. That being our decision, we are of the firm view that taken as the date of the set-off (27 March 1990) the five elements enumerated by the learned counsel for the appellant applied since under s 219 of the Act, a winding up of a company commences when a petition for winding up is presented thus:

219 Commencement of winding up by the court

(1) Where before the presentation of petition a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and, unless the court on proof of fraud or mistake thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up.

What then is the effect of any transaction on the property of a company having been wound up? Section 293 of the Act provides:

293 Undue preference

(1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which,

had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall in the event of the company being wound up be void or voidable in like manner.

(2) For the purposes of this section the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be —

(a) in the case of a winding up by the court —

(i) the date of the presentation of the petition; or

(ii) where before the presentation of the petition a resolution has been passed by the company for voluntary winding up the date upon which the resolution to wind up the company voluntarily, is passed, whichever is the earlier; and

(b) in the case of a voluntary winding up the date upon which the winding up is deemed by this Act to have commenced.

(3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

On the other hand, if s 293 of the Act is read with s 53 of the 1967 Act, it would give the following result. Section 53 of the 1967 Act provides:

Avoidance of preferences in certain cases

53 (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts, as they become due, from his own money in favour of any creditor or any person in trust for any creditor shall be deemed to have given such creditor a preference over other creditors if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same and every such act shall be deemed fraudulent and void as against the Official Assignee.

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

(3) For the purposes of this section 'creditor' includes a surety or guarantor for the debt due to that creditor.

What bearing, if any, have ss 223 and 233 of the Act? They provide:

Avoidance of dispositions of property, etc

223 Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court shall unless the court otherwise orders be void.

233(1) Where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.

(2) The court may, on the application of the liquidator, by order direct that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator and thereupon the property to which the order relates shall vest accordingly and the liquidator may, after giving such indemnity, if any, as the court directs, bring or defend any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.

(3) Where an order is made under this section every liquidator of a company in relation to which the order is made shall lodge within seven days of the making of the order —

(a) an office copy of the order with the Registrar; and

(b) where the order relates to land, an office copy of the order with the appropriate authority concerned with the registration or recording of dealings in that land,

and every liquidator who makes default in complying with this section shall be guilty of an offence against this Act.

Penalty: Two thousand ringgit. Default penalty.

(4) No vesting order referred to in this section shall have any effect or operation in transferring or otherwise vesting land until an appropriate entry or memorandum thereof is made by or with the appropriate authority.

Our answer is the same when learned counsel for the appellant referred us to the second and third grounds of the appeal. We have carefully considered these grounds and we find no merit in the argument of the learned counsel for the appellant. The learned judicial commissioner had already addressed himself quite adequately to the arguments before him in respect of these grounds and we support his correct conclusion as stated in his grounds of judgment.

Lastly, we wish to conclude that we agree with the submission of the learned counsel for the respondent that there is really one issue posed to us for our determination which is whether the particular set-off already referred to is valid or void. As has been held by the learned judicial commissioner in his judgment at pp 43–44 of the appeal record, after having discussed at length the correctness of the decision in *JB Precision Moulding Industries Sdn Bhd (In liquidation) v Asia Commercial Finance (M) Sdn Bhd* [1994] 1 MLJ 734, the amendment or insertion of a new para (k) to sub-s (3) of s 108 of the Act did not save the situation. He said:

> I agree entirely with the decision in that case that s 108(3)(k) does not operate retrospectively, thus, under the circumstances, that amendment is also not applicable to the instant case.

We also agree with the conclusion of the learned judicial commissioner when he held at p 44 of the appeal record (where the appellant was respondent):

A On the whole, I am of the view that the transaction is caught by ss 293, 223 and 233 of the said Act and hence, the respondent cannot at all set-off the security deposit and the prepaid rent deposit from the amount owing by the applicant company to the respondent on the unpaid balance of the total lease rentals when the lease agreement was terminated on 27 March 1990. Since the applicant company is now wound up, the respondent would now B stand in the shoes of a general creditor. Thus, I would allow the applicant company's application for an order that the respondent do pay the applicant company the sum of RM68,458 together with interest at the rate of 8% from 23 April 1990 to the date of realization and costs.

With due respect to learned counsel for the appellant, we cannot find any C reason why we should interfere with the decision of the learned judicial commissioner and for reasons stated above, we dismiss this appeal with costs.

**Abdul Malek Ahmad JCA**: Judgment had been reserved to this date after D arguments were presented on 11 September 1996. We had deliberated on the issues raised and have now by a majority decision concluded that the appeal should be dismissed with costs and the deposit is to be paid out to the respondent to account of their taxed costs. I have read the draft judgments of my learned sister Siti Norma Yaakob JCA and my learned brother Abu Mansor Ali JCA, but have come to a different conclusion. E

The parties had entered into a lease agreement on 30 December 1988 whereby the appellant agreed to lease to the respondent one unit of an Elite E330B Plastic Injection Moulding Machine complete with accessories for three years at a monthly rental of RM3,958. By F a memorandum of deposit executed simultaneously, the respondent had to pay a refundable security deposit of RM64,500. In addition, they also made payment of a prepaid rent deposit of RM3,958. It is this amount totalling RM68,458 which had been awarded to the respondent's liquidator by the learned trial judicial commissioner on 5 June 1995 that has resulted in this appeal.

G A winding-up petition was presented against the respondent on 2 December 1989 which was just over 11 months after the lease agreement. On 27 March 1990, the appellant's solicitors gave notice to the respondent terminating the lease agreement and demanding payment of RM101,625.54 being the unpaid balance of the lease rentals excluding the two deposits H mentioned earlier on the grounds that the presentation of the winding up petition constituted a breach of the lease agreement.

The respondent was wound up on 4 April 1990 and its court appointed liquidator Ng Pyak Yeow on 23 April 1990 demanded from the appellant the refund of the two deposits. He had accordingly filed a notice of motion I for that purpose on 14 July 1993. The appellant refused to do so pursuant to ss 223 and 293 of the Companies Act 1965 ('the Act').

Section 223 of the Act states:

> 223 Avoidance of dispositions of property, etc
>
> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the court otherwise orders be void.

It is most pertinent at this point to refer to s 219 of the Act which reads:

> 219 Commencement of winding up by the court
>
> (1) Where before the presentation of the petition a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and, unless the court on proof of fraud or mistake thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.
>
> (2) In any other case the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up.

Section 293 of the Act is also reproduced for this purpose:

> 293 Undue preference
>
> (1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall in the event of the company being wound up be void or voidable in like manner.
>
> (2) For the purpose of this section the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be —
>
> (a) in the case of a winding up by the court —
>
> (i) the date of the presentation of the petition; or
>
> (ii) where before the presentation of the petition a resolution has been passed by the company for voluntary winding up the date upon which the resolution to wind up the company voluntarily, is passed,
>
> whichever is the earlier; and
>
> (b) in the case of a voluntary winding up the date upon which the winding up is deemed by this Act to have commenced.
>
> (3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

Learned counsel for the appellant before us submitted on three issues. The first was whether the two deposits were an undue preference and void under s 293 of the Act read together with s 53 of the Bankruptcy Act 1967 ('the Bankruptcy Act'). The latter section reads:

> 53 Avoidance of preferences in certain cases
>
> (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding

A taken or suffered by any person unable to pay his debts, as they become due, from his own money in favour of any creditor or any person in trust for any creditor shall be deemed to have given such creditor a preference over other creditors if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or
B suffering the same and every such act shall be deemed fraudulent and void as against the Official Assignee.

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

C (3) For the purposes of this section creditor includes a surety or guarantor for the debt due to that creditor.

The contention of the respondent is that s 293 of the Act prohibits the appellant from giving themselves an undue preference over other unsecured creditors. At the same time, since the two deposits represent the assets of
D the respondent after being wound up, their liquidator must take possession of it under s 233 of the Act. Subsection (1) of that section states that where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled. Subsection (2) provides that the
E court may, on the application of the liquidator, by order direct that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator and thereupon the property to which the order relates shall vest accordingly and the liquidator may, after giving such indemnity, if any, as the court directs,
F bring or defend any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.

The respondent also maintained that the appellant is not a secured creditor under s 2 of the Bankruptcy Act. The definition of 'secured
G creditor' under that Act is:

> ... a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor, but shall not include a plaintiff in any action who has attached the property of the debtor before judgment.

H Nor are they a preferred creditor under s 292 of the Act. Accordingly, any forfeiture by the appellant is void against the respondent in view of s 223 of the Act read together with s 293 of the Act and s 53 of the Bankruptcy Act which have all been restated earlier.

It was also the respondent's submission that the memorandum of deposit was not registered pursuant to s 108 of the Act rendering the
I transaction void against the respondent's liquidator. The section states at sub-s (1) that subject to Division 7 of Part IV of the Act where a charge to which the section applies is created by a company, there shall be lodged with the Registrar for registration within 30 days after the creation of the charge a statement of the prescribed particulars and:

(a) the instrument (if any) by which the charge is created or evidenced; or

(b) a copy thereof together with an affidavit verifying the execution of the charge and also verifying the copy as being a true copy of the instrument,

and if this section is not complied with in relation to the charge, the charge shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company.

The respondent also argued that the forfeiture of the two deposits after the presentation of the winding up petition is void, citing *Bah Heng Hong Sdn Bhd v The Provisional Liquidator Choong Shin Cheong & Anor* [1992] 3 CLJ 1421. The plaintiffs in that case had rented their premises to a company which had deposited RM100,000 for the due performance of all the covenants and conditions while being a tenant of the premises. The tenancy was determined prematurely and the deposit forfeited. The company was wound up three weeks later. The liquidator demanded the refund of the sum forfeited by the plaintiffs and the court held that since the forfeiture had taken place after the presentation of the winding up, it was void under s 223 of the Act.

Learned counsel for the appellant submitted that, to be entitled to the amount prayed for, the respondent had to prove the five elements enunciated in a number of earlier authorities on similar facts, namely:

(a) that the transaction took place within six months prior to the commencement of the winding up;

(b) that it satisfies the description of one of the types of transaction mentioned in s 53(1) of the Bankruptcy Act;

(c) that it took place at the time when the respondent was insolvent;

(d) that the person in whose favour the transaction was effected stood in relation of creditor of the respondent; and

(e) the effect of the transaction was to confer on that person a preference, priority or advantage over other creditors in the winding up.

Learned counsel for the appellant maintained that the property in the security deposit had passed to the appellant as it was not a security in the contractual sense and does not fall within the contemplation of s 108 of the Act and therefore need not be registered. Further, it is clear from the terms of the lease agreement that it is a security for the due performance by the respondent of the terms thereof.

For this purpose, it is necessary to reproduce cl 4 of the lease agreement:

4 DEPOSIT OR PREPAID RENT

On execution of this agreement the lessee shall pay to the lessor a deposit and/or prepaid rent as described in item (6) of the schedule as the lessor

shall at its absolute discretion decide and such deposit and/or prepaid rent will be retained by the lessor and dealt with in the manner as follows:

4.1 In the event of the lessor electing to collect a deposit ('the deposit') such deposit shall be retained by the lessor as security for the due observance and performance by the lessee of the stipulations terms and conditions of this agreement and any renewal thereof. The deposit shall be maintained at the same amount during the term of this agreement and shall not be treated as payment of the rent or any part thereof and the same shall be returned to the lessee free of interest on the termination of this agreement less such sums as may then be due to the lessor under the terms of this agreement but without prejudice to any other claims which the lessor may have against the lessee under the terms of this agreement.

4.2 In the event of the lessor electing to collect a prepaid rent ('the prepaid rent') such prepaid rent shall be retained by the lessor as security for due observance and performance by the lessee of the stipulations terms and conditions of this agreement and any renewal thereof, the prepaid rent shall bear no interest and subject as hereinafter provided in this paragraph shall be automatically applied by the lessor in satisfaction of the rent falling due on the dates mentioned in the said item (6) of the schedule on the due dates therefor until it is exhausted provided always that this provision shall in no way relieve the lessee from promptly paying the rent falling due on dates other than those mentioned in the said item (6) of the schedule.

4.3 Notwithstanding the provisions of paras (1) and (2) of this clause if the lessee is in default under any of the provisions of this lease agreement (including the events referred to in cl 14 hereunder) then the lessor shall be entitled at its discretion to apply the deposit and/or the prepaid rent or any part thereof against all and any monies, damages and/or arrears of the rent as the lessor thinks fit and, unless the lessor shall exercise its rights and terminate the lease hereby created under sub-paras (i) and (ii) of cl 14.1, the lessee shall on written demand by the lessor again pay to the lessor the full amount of the deposit and/or the prepaid rent (or such amount as may be required to make up the full amount referred to in item (6) of the schedule) which shall serve as security and be treated in the same way as the deposit and/or the prepaid rent paid originally in accordance with paras (1) and (2) of this clause.

4.4 If there is any other form of securities given to the lessor in addition to the deposit and/or the prepaid rent (or treated as such under para (2) of this clause) all of such securities (including the deposit and/or the prepaid rent) shall be deemed to secure all claims of the lessor and the order of use of such securities and the deposit and/or the prepaid rent shall be at the entire absolute and unfettered discretion of the lessor.

Clause 14(1) of that agreement is also relevant, in particular, para (g):

14 DEFAULT

14. (1) If during the initial term or any renewed term thereof, the lessor ascertains that the lessee has made a false inaccurate or misleading statement in or in relation to the making of this lease or if —

...

(g) the lessee is subject to any writ of execution, distress, attachment or disposition (regardless of whether or not the same affects the equipment); or on a petition for the bankruptcy dissolution or winding-up of the lessee being presented;

...

then the lessor shall be entitled to immediate possession or demand the return of the equipment and the lessor may, without prejudice to any other rights and remedies the lessor may have under this agreement:

(i) immediately terminate this lease without notice and retake possession of the equipment and for this purpose enter upon any land or building on or in which the equipment is or is believed by the lessor or its agents to be situated and if the equipment or any part thereof is affixed to any land or building the lessor shall be entitled to sever the same therefrom and the lessee shall be responsible for all damage caused to the land or building by such removal; or

(ii) by written notice to the lessee determine and end this lease and thereupon the lessee shall no longer be in possession of the equipment with the lessor's consent. The lessor may thereafter but shall not be obliged to retake possession of the equipment or require the lessee by the said notice to deliver up the equipment to the lessor at the address of the lessor stated in this lease or at such other address as the lessor may specify.

Item (6) of the schedule states:

ITEM (6) Deposit or prepaid rent:

Deposit: RM64,500

Prepaid rent: RM3,958 covering the last one (1) month/x.

It is also relevant to reproduce the memorandum of deposit at this juncture:

MEMORANDUM OF DEPOSIT

To : Sime Diamond Leasing (M) Sdn Bhd

In consideration of your entering into an equipment lease agreement with we/us in respect of the following equipment:

One (1) unit Elite E330B plastic injection moulding machine with

(i) hydraulic safety interlock; (ii) auto clamp force adjustment; and (iii) corrosion resistance screw/barrel. S/No IMF3-2147.

I/We the undersigned have this day deposited with you the sum of Dollars *Ringgit sixty-four thousand and five hundred only* ($64,500) as security for the performance of the terms and conditions contained in a separate equipment lease agreement.

I/We agree that this deposit is refundable to me/us free of interest at the expiry of the said agreement and only on complete satisfaction of each and every term and condition contained therein.

A Dated 30 December 1988.

Sgd
(common seal) Signature of depositor

Name & Address of Depositor:
JB Precision Moulding Industries
B Sdn Bhd
16 Jalan Bakawali 72
Taman Johor Jaya
81100 Johor Bahru

In the presence of:

(Wong Tuck Hing) Sgd
C Name: Wong Tuck Hing Signature of witness

(If the depositor is a limited company, the company seal of that company must be affixed).

To support their contention, learned counsel for the appellant had referred
D to *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 at p 94 where the Privy Council held that the deposit is not merely a part payment but is also an earnest to bind the bargain so entered into and created by fear of its forfeiture a motive in the payer to perform the rest of the contract and that a deposit is a guarantee that the contractual relations will be performed.

E Accordingly, the appellant's argument is that when the respondent allowed itself to be wound up, it lost the right to the security deposit and the simultaneous execution of the memorandum of deposit showed that the disposition as envisaged by s 223 of the Act had taken place and the appellant was entitled to a set-off.

F The learned trial judicial commissioner had distinguished the facts in *Linggi*'s case with the present one. In the former, he said, it involved the sale of real property and it was agreed that the deposit constituted a part payment. Here, the two deposits are deposits for the leasing of machinery and the intention of the payment thereof differs as cl 4 of the lease agreement specifically states that it shall not be treated as payment of
G rentals.

So, did the property in the two deposits pass to the appellant on 30 December 1988? The lease agreement clearly says it does not as they are to be returned to the respondent free of interest on the termination of the said agreement. The appellant, therefore, had possession of them but
H never ownership. However, there is a qualification. This is provided the respondent fully complies with the terms of the lease agreement.

As for the prepaid rent deposit, it can even be used to set-off any rentals fully due. Further, the effect of both cll 4.1 and 4.2 of the lease agreement is that the two deposits are retained by the appellant 'as security
I for the due observance and performance' by the respondent of 'the stipulations, terms and conditions of this agreement and any renewal thereof'.

But the answer really lies in cl 4.3 of the lease agreement which categorically states that if the respondent is in default under any of the provisions of the lease agreement, including the events specified in cl 14 which includes winding up proceedings, then the appellant is entitled at its discretion to apply the two deposits against any monies, damages and arrears as it thinks fit and on demand by the appellant, the respondent is to pay the full amount of the two deposits to set-off the amount actually due.

Therefore, when the winding up petition was presented against the respondent on 2 December 1989, default under cl 14 has occurred and the property in the two deposits no longer remained with the respondent. This is because winding up proceedings constitute a breach of the lease agreement. Accordingly, the appellant had written to the respondent on 27 March 1990 to determine the said agreement.

Since the property in the two deposits had passed to the appellant, the appellant is not claiming to be in a better position than other creditors after the presentation of the winding-up petition on the respondent on 2 December 1989 as their right to the property dates back to the date of the lease agreement on 30 December 1988. Of course, the respondent's liquidator is required under s 233 of the Act to take the said property into his custody and control but this is merely an omnibus provision for property which he has a right to take in the first place which does not apply in this case.

The appellant contended that the disposition of the property in the two deposits is not a disposition within the interpretation of s 223 of the Act as it took place more than six months before the winding up proceedings commenced in which case that section does not apply when read with s 53 of the Bankruptcy Act. The learned trial judicial commissioner held that the set-off by the appellant after the commencement of the winding up is a disposition envisaged by s 223 of the Act and hence void.

Since the passing of the property, to my mind, relates back to the date of the lease agreement, I am inclined to agree with learned counsel for the appellant that the transaction, which took place on 30 December 1988, did not take place within six months prior to the commencement of the winding up on 2 December 1989, that it took place at the time when the respondent was solvent as the winding up order was only on 4 April 1990, and that the effect of the transaction was not to confer on the appellant a preference, priority or advantage over other creditors in the winding up because on the date of the lease agreement, the appellant was not a creditor of the respondent.

As for the non-registration as required by s 108 of the Act, it had been held in *JB Precision Moulding Industries Sdn Bhd (In liquidation) v Asia Commercial Finance (M) Sdn Bhd* [1994] 1 MLJ 734 that it did not apply to a transaction of this nature as para (k) of sub-s (3) of that section which came into force on 25 September 1993 did not operate retrospectively. In my view, that decision actually works in favour of the appellant as registration was not necessary

A either on the date of the lease agreement, the date of the commencement of the winding up or the date demand was made, as all three dates are prior to 25 September 1993.

My considered opinion is that the lease agreement was a straightforward transaction and it was never the intention of the parties to
B put the appellant in a better position than other creditors.

The second ground raised by learned counsel for the appellant is the effect of s 223 of the Act. She maintained that a set-off cannot fall within the meaning of that section.

She had referred to an Australian authority which fits quite well into
C the particular circumstances of our case. In *Re Margart Pty Ltd (In liquidation)*; *Hamilton v Westpac Banking Corp & Anor* (1984) 2 ACLC 709, it was held that:

> The word 'disposition', when used with reference to property, normally has the meaning of connoting a change in the beneficial ownership of an asset by transfer or other type of dealing. The word 'disposition' in s 368, does
> D not include the process by which a person with a beneficial interest in property of a company obtains that property, or the proceeds of its realization, from the company at a time when he is entitled to have it (*Re Clifton Place Garage Ltd* [1970] 1 Ch 477 distinguished). The liquidator was not able to recover from the bank the money paid to it by the company.

E Section 368 of the Companies Code in Australia is the corresponding provision to our s 223 of the Act. At p 712 of *Re Margart Pty Ltd*, the speech of Helsham CJ states:

> As a third step, whatever meaning the word 'disposition' may have when used in the phrase 'any disposition of property of the company' in s 368, it does not include the process by which a person with a beneficial interest in
> F the property, obtains that property, or the proceeds of its realization, from the company at a time when he is entitled to have it. In all reality, a person would not normally be described as disposing of his property when he hands it over to another to whom he had previously promised to deliver it on the happening of a certain event when that event occurs. This is only another way of stating in legal terms the proposition that the word 'disposition',
> G when used with reference to property, normally has the meaning of connoting a change in the beneficial ownership of an asset by transfer or other type of dealing. I am indebted to the editors of the Australia Law Journal for collecting some cases on this topic (48 ALJ 460); see also per Jacobs JA in *Roache v Australian Mercantile Loan & Finance Co Ltd (No 2)* [1966] 1 NSWR 384 at p 388 and *Grimwade v FC of T* (1949) 78 CLR 199. I can
> H see no reason why that approach should not be adopted in relation to s 368. It does not in any way run counter to what was decided in *Re Leslie Engineers Co Ltd (In liquidation)* [1976] 1 WLR 292 or in *Re Gray's Inn Construction Co Ltd* (supra). Nor is it in conflict with the decision in *Re Clifton Place Garage Ltd* [1970] 1 Ch 477, a case particularly relied upon by the liquidator here. When the facts of that case are analysed, it can be seen that the
> I payments by the company to the bank during the interval between the presentation of the petition to wind up and the making of the order for winding up, payments which were admitted to be dispositions of the property

of the company, were not payments of money or assets covered by any charge.

The decision that I have reached accords with the rationale that lies behind s 368. The locus classicus of that is to be found in the reasons for judgment of Lord Cairns LJ in *Re Wiltshire Iron Co Ltd, ex p Pearson* (1868) 3 Ch App 443 at p 446, where his Lordship said concerning s 153 of the 1862 English Act (which is to the same effect as s 368):

> 'The 153rd section no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding up (that is the presentation of the petition) and the order for winding up, shall, unless the court otherwise orders, be void. This is a wholesome and necessary provision, to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremis.'

What lies behind the section is the prevention of the improper alienation and dissipation of the company's property. I do not believe it was intended to reach out to transactions by which a secured creditor receives assets covered by his security at a time when he was entitled to have them.

To hold otherwise would mean that assets covered by a fixed charge, or their monetary equivalent, could not with impunity be taken by or paid to the person having the benefit of the charge at any time after the commencement of the winding up. Anything done by the company or a receiver to pay the chargee or transfer assets to the chargee would be void. No bank or other person holding a charge under which moneys had become payable could take payment without the precaution of obtaining what is known as a validating order, I do not believe that s 368 was intended to operate in that way.

Perhaps this conclusion is only another way of stating that retrieval of property the subject of a charge by a chargee when he is entitled to have it is not to be categorized as a disposition of the property of the company within the meaning of s 368. If this be, so it does not affect the present case; the result is the same. The liquidator is not able to recover from the bank the money paid to it by the company. The special situation that applied in *AMP Society v Geo Myers & Co Ltd (In liquidation)* (1931) 47 CLR 65 (see per Dixon J at pp 82–83) is not in point here.

The third ground relates to s 292 of the Act and s 41 of the Bankruptcy Act. Section 292 of the Act reads:

> 292 Priorities
>
> (1) Subject to this Act, in a winding up there shall be paid in priority to all other unsecured debts —
>
> (a) firstly, the costs and expenses of the winding up including the taxed costs of a petitioner payable under s 220, the remuneration of the liquidator and the costs of any audit carried out pursuant to s 281;
>
> (b) secondly, all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, of any employee not exceeding one thousand five hundred dollars or

such other amount as may be prescribed from time to time whether for time or piecework in respect of services rendered by him to the company within a period of four months before the commencement of the winding up;

(c) thirdly, all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of the winding up;

(d) fourthly, all remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before the commencement of the winding up;

(e) fifthly, all amounts due in respect of contributions payable during the twelve months next before the commencement of the winding up by the company as the employer of any person under any written law relating to employees superannuation or provident funds or under any scheme of superannuation or retirement benefit which is an approved scheme under the federal law relating to income tax; and

(f) sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.

(2) The debts in each class specified in sub-s (1) shall rank in the order therein specified but as between debts of the same class shall rank equally between themselves, and shall be paid in full, unless the property of the company is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

(3) Where any payment has been made to any employee of the company on account of wages salary or vacation leave out of money advanced by a person for that purpose, the person by whom the money was advanced shall, in a winding up, have a right of priority in respect of the money so advanced and paid, up to the amount by which the sum in respect of which the employee would have been entitled to priority in the winding up has been diminished by reason of the payment, and shall have the same right of priority in respect of that amount as the employee would have had if the payment had not been made.

(4) So far as the assets of the company available for payment of general creditors are insufficient to meet any preferential debts specified in sub-s (1)(b), (d) and (e) and any amount payable in priority by virtue of sub-s (3), those debts shall have priority over the claims of the holders of debentures under any floating charge created by the company, and shall be paid accordingly out of any property comprised in or subject to that charge.

(5) Where the company is under a contract of insurance (entered into before the commencement of the winding up) insured against liability to third parties, then if any such liability is incurred by the company (either before or after the commencement of the winding up) and an amount in respect of that liability in or has been received by the company or the liquidator from the insurer the amount shall after deducting any expenses of or incidental to getting in the amount, be paid by the liquidator to the third party in respect of whom the liability

was incurred to the extent necessary to discharge that liability or any part of that liability remaining undischarged in priority to all payments in respect of the debts referred to in sub-s (1).

(6) If the liability of the insurer to the company is less than the liability of the company to the third party nothing in sub-s (5) shall limit the rights of the third party in respect of the balance.

(7) Subsections (5) and (6) shall have effect notwithstanding any agreement to the contrary entered into after the commencement of this Act.

(8) Notwithstanding anything in sub-s (1) —

(a) para (c) of that subsection shall not apply in relation to the winding up of a company in any case where the company is being wound up voluntarily merely for the purpose of reconstruction or of amalgamation with another company and the right to the compensation has on the reconstruction or amalgamation been preserved to the person entitled thereto, or where the company has entered into a contract with an insurer in respect of any liability under any law relating to workers compensation; and

(b) where a company has given security for the payment or repayment of any amount to which para (f) of that subsection relates, that paragraph shall apply only in relation to the balance of any such amount remaining due after deducting therefrom the net amount realized from such security.

(9) Where in any winding up assets have been recovered under an indemnity for costs of litigation given by certain creditors, or have been protected or preserved by the payment of moneys or the giving of indemnity by creditors, or where expenses in relation to which a creditor has indemnified a liquidator, have been recovered the court may make such order as it deems just with respect to the distribution of those assets and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk run by them in so doing.

Section 41 of the Bankruptcy Act states:

41 Mutual credit and set-off

(1) Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order is made under this Act and any other person proving or claiming to prove a debt under such order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account and no more shall be claimed or paid on either side respectively.

(2) A person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor notice of an act of bankruptcy committed by the debtor and available against him.

In *The Law of Company Liquidation* by the Hon Mr Justice BH McPherson, at pp 382–385, he had dealt with the issue of set-off. The said pages are reproduced below:

> 7 SET-OFF
>
> The question of set-off is of little practical importance in relation to solvent companies since the company's creditors are in any event assured of payment in full; but it assumes considerable significance in the winding up of companies which are insolvent since here the effect of permitting set-off is, on the one hand, to relieve the company pro tanto of the duty of paying a dividend on a debt due to the creditor, and, on the other, to enable the creditor pro tanto to pay himself in full out of a debt which he owes to the company. Under the Act of 1862, it seems to have been the practice to allow set-off in respect of liquidated claims but the present position results from s 10 of the Judicature Act and is a further consequence of the incorporation, by what is now s 438(2) of the Companies Act, of the bankruptcy rules with regard to debts provable. In *Mersey Steel Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434, it was held by the House of Lords that the Judicature Act had the effect of introducing the provisions of the bankruptcy legislation with respect to set-off, and in Australia these are contained in s 86 of the Bankruptcy Act 1966 (Cth). Their effect, as Sir Owen Dixon has expressed it:
>
> > 'is to require that, where there have been mutual credits, mutual debts, or other mutual dealings between an insolvent company in liquidation and any person proving or claiming to prove a debt in the winding up, an account should be taken of what is due from one party to the other and the sum due from the one party should be set-off against the sum due from the other.'
>
> The balance (if any) is the amount for which the creditor is entitled to prove in winding up.
>
> There can be no estoppel against the requirements of the section so that a liquidator will be directed to repay an amount paid to him by a creditor under a mistake of law in ignorance of the right of set-off conferred by the section — *Re Paddington Town Hall Centre Ltd* (1980) 4 ACLR 673.
>
> (1) What may be set-off
>
> Generally speaking, set-off will be permitted whenever, prior to winding up, there have been mutual dealings between the parties ending in a claim sounding in money which is capable of being proved in winding up. To quote once again the words of Sir Owen Dixon:
>
> > 'It is enough that at the commencement of the winding up mutual dealings exist which involve rights and obligations whether absolute or contingent of such a nature that afterwards, in the events that happen, they mature or develop into pecuniary demands capable of set-off. If the end contemplated by the transaction is a claim sounding in money so that, in the phrase employed in the cases, it is commensurable with the cross-demand, no more is required than that at the commencement of the winding up liabilities shall

have been contracted by the company and the other party respectively from which cross money claims accrue during the course of the winding up — *Hiley v People's Prudential Assurance Co* (1938) 60 CLR 468 at p 497.'

It follows that, provided the claim is provable in the winding up, it need not be a liquidated sum or one due at the date of the liquidation of the company: damages, whether liquidated or unliquidated, may be the subject of a set-off, as may contingent claims, secured debts, and future debts due to mature only after the commencement of winding up. There are, however, three requirements which must always be satisfied before set-off can take place: (a) the claims must exist at the commencement of the winding up; (b) they must be commensurable; (c) there must be mutuality.

(a) *Time of existence.* The time for determining whether a right to set-off exists is the date of commencement of the winding up. At that date, there must be mutual dealings giving rise to obligations which are capable ultimately of being the subject of an account between the parties. Obligations created only after winding up has commenced cannot be set-off and there can be no set-off in respect of a debt which at the relevant date has been assigned to some other person except to the extent of any residue which remains. Similarly, where at the date winding up commences no right to set-off exists, it cannot be acquired by virtue of any subsequent assignment.

(b) *Commensurability.* Although, as we have seen, the claims sought to be set-off need not be liquidated, they must at least be 'commensurable' at the time winding up commences. The leading case, and one of the few illustrations of this requirement, is *Eberle's Hotel & Restaurant Co v Jonas* (1887) 18 QBD 459, where it was held that there was no right to set-off a debt against a claim by the company based on a judgment in its favour for the return of certain cigars. The court stressed the impossibility of complying with the terms of the section, for as Fry LJ put it, 'in no case can there be an account between cigars and money'.

(c) *Mutuality.* Referring to the phrase 'mutual dealings' in s 82 of the Bankruptcy Act, Lord Esher MR, in the case last cited, stated that whatever came within the description of an ordinary business transaction would be a dealing within that section. Nevertheless, it is well settled that before set-off can take place, the characteristic of mutuality must also be present, and it is the absence of this requirement which explains why there can be no set-off in respect of debts owing to and by a particular person in different capacities, as, for example, debts due to and from a trustee or partner in his character as such and in his individual capacity. There are, moreover, several decisions which suggest that the element of mutuality can only exist where the respective debts or claims arise out of contract and this was the reason why, in *Re Mid-Kent Fruit Factory* [1896] 1 Ch 567, the claimant was not permitted to set off, against a debt owing by the company, a sum of money deposited with him for a specific purpose. However, in *Re DH Curtis (Builders)*

A *Ltd* [1978] 2 WLR 28, Brightman J held that the section is not restricted to claims arising out of contract. Accordingly, his Lordship allowed the Crown to set off a tax rebate payable to a company in liquidation against moneys owed by the company to other government departments.

B Learned counsel for the respondent had referred to *Good Property Land Development Pte Ltd (In liquidation) v Societe-Generale* [1996] 2 SLR 239 but with respect to learned counsel, the facts there are quite different and have no relevance here.

He also submitted that the date of the lease agreement does not matter and in their books, the amount of the two deposits stands as credit C balance. He added that the set-off is permissible if done before the commencement of the winding up. This submission is at the least shocking as there would be really nothing to set-off before the commencement of the winding up because the default can only take place at that point of time and never earlier.

D Having considered the arguments and authorities, it is my view that the relevant date is the date of the commencement of the winding up, namely 2 December 1989. On that date, default had taken place by virtue of cl 14(1)(g) of the lease agreement and the appellant had a right to the two deposits by virtue of cl 4 of the said agreement.

E The appellant cannot be considered a creditor as the transaction in question is the execution of the lease agreement and when the situation is related back to that date, namely 30 December 1988, only one of the five elements required to render the transaction void exists and that is it satisfies the description of one of the types of transaction mentioned in s 53(1) of the Bankruptcy Act as it is both a payment made and an F obligation incurred.

The act of default must be construed as a normal act of default under any normal commercial transaction where the aggrieved party has a right under the agreement to forfeit the amount paid. There is no question of priority, preference or advantage over other creditors in a winding up as G the set-off relates only to the default and nothing else. It so happens that the default is the commencement of the winding up petition itself. Once default takes place, the property in the two deposits automatically passes to the appellant. They are, therefore, rightfully and lawfully entitled to the money now claimed by the respondent.

H It must also be noted that the facts are not disputed and the parties are only quarrelling over the two deposits and not the total amount due from the respondent to the appellant as in the letter of demand dated the 27 March 1990 which will of course be governed by the laws of bankruptcy. If no default had taken place by reason of the winding up proceedings, then the two deposits would be returned to the respondent at the end of I the lease agreement period provided all the terms and conditions had been fulfilled. In that respect, the transaction satisfies the requirement of mutual dealings under s 41 of the Bankruptcy Act.

Since the set-off of the two deposits by the appellants, to my mind, are neither void nor voidable, I disagree with the learned trial judicial commissioner that the respondent is entitled to the amounts claimed. This appeal is allowed with costs here and below and the deposit is to be refunded to the appellant.

*Appeal dismissed.*

Reported by K Tang-Wai